Sheet Metal Workers International Association Local Union No. 104 (Brisco Sheet Metal, Inc.) *and* Richard L. Anderson. Case 20–CB–8803

May 20, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On August 19, 1992, Administrative Law Judge Jerrold H. Shapiro issued the attached decision. The General Counsel and Charging Party filed exceptions and supporting briefs, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

The judge found that the Respondent did not violate Section 8(b)(1)(A) of the Act by charging and fining member Richard Anderson for violating a rule of the Respondent incorporated in its collective-bargaining agreement with the Employer, which prohibits employee-members from possessing an active California state contractors' licenses.[2]

The General Counsel excepts to the judge's decision, arguing, inter alia, that the testimony of Union Representative David Browning establishes that the Respondent charged and fined Anderson because of his postresignation conduct of operating a nonunion sheet metal business. We disagree.

Browning testified that during the last 2 weeks of May 1991, he received complaints from three employees that Anderson was going into business for himself. Browning investigated these complaints but found no evidence that Anderson was in business as a sheet metal contractor. Subsequently, however, on June 3, Browning received Anderson's letter of resignation from the Union. Browning decided to resume his investigation into Anderson's status as a contractor. Browning testified that he became suspicious that Anderson was violating the collective-bargaining agreement and that his resignation was an attempt to escape internal union discipline. On further investigation, Browning found that Anderson had possessed an active California state contractor's license since August 1990 in violation of the collective-bargaining agreement. Browning charged Anderson with a violation of the collective-bargaining agreement and imposed a $2850 fine that had been suspended from a previous unrelated contract violation.

Browning testified that he ''asked for the imposition of the fine because Mr. Anderson was in violation of the constitution and contract prior to May 31.'' However, when asked by counsel for the Charging Party whether he would have done that if Anderson had opened a union shop, Anderson replied, ''I don't know. That never happened. It's hypothetical.'' When pressed, Browning testified that he would ''possibly not'' have sought the fine if Anderson had signed a contract with the Union. Browning stated that he would be a union contractor at that point and would be in compliance with the collective-bargaining agreement. When asked to clarify, Browning said that ''there are too many circumstances to really responsibly answer that. He may not have resigned from the Union to open a Union shop. He may have remained a member of the Union to open a Union shop. There are a lot of things in there that did not happen that I can't tell you about. Speculation.'' Browning also testified that it is not a violation of the collective-bargaining agreement for an *owner*-member to maintain an active contractor's license and sign a contract with the Respondent.

The judge found, and we agree, that Browning's testimony, when viewed in its entirety, does not rise to the level of an admission against interest and is no more than speculation. Browning was asked a hypothetical question and responded by stating what he ''possibly'' might not have done. Furthermore, it is not even clear that Browning was addressing the scenario of an employee-member possessing an active contractor's license, resigning, and then operating a union shop. Thus, during further questioning, Browning stated that Anderson might have remained a union member if he opened a union shop and also referred to owner-members being permitted under union rules to hold active licenses and engage in contracting if they sign a contract with the Respondent. The import of this line of testimony is, at best, uncertain. In contrast, the judge credited Browning's testimony that his decision to investigate, charge, and fine Anderson was based solely on Anderson's preresignation conduct of possessing an active contractor's license. We do not believe that the conjectural and obscure testimony relied on by the General Counsel provides sufficient basis to warrant reversing the judge's finding that the Respond-

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We correct the following inadvertent omissions from the judge's quotation of item 33 of the collective-bargaining agreement at sec. I,A,1, par. 2 of his decision: in sec. C, ''before'' should be inserted between ''Code,'' and ''being,'' and in sec. D, ''to notify the other party of any employee with a current'' should be inserted between ''Management'' and ''contractors.''

ent's decision to discipline Anderson was not motivated by postresignation conduct.[3]

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[3] We do not rely on the judge's statement in sec. I,B,I, par. 5 of his decision, that the Respondent's discipline of Anderson would not violate Sec. 8(b)(1)(A) even if the Respondent had not made Anderson aware of his obligation to deactivate his license while employed by the Employer. It is undisputed that Anderson possessed a copy of the Respondent's 1986–1989 collective-bargaining agreement with the Employer, which contains the provision prohibiting the conduct at issue, and a copy of the Respondent's ''Constitution and Ritual'' which provides for internal union discipline in the event that a member violates any of the rules established by the collective-bargaining agreement. In addition, the record shows that the Respondent had disciplined other members for the same violation. Accordingly, we find that Anderson had sufficient notice that he could be subject to internal union charges and discipline for possessing an active state contractor's license while employed by a signatory employer.

We agree with the judge that there is no merit in the General Counsel's contention that the Respondent's rule was not reasonably enforced against Anderson. However, we do not rely on the judge's alternative rationale in sec. I,B,I, par. 10 of his decision, that even assuming the rule was not reasonably enforced and did not reflect a legitimate union interest, its enforcement against Anderson still did not violate Sec. 8(b)(1)(A) because it ''did not affect Anderson's employment or employment opportunities nor did it contravene any federal policy.''

Mary Vail, Esq., for the General Counsel.
Kathryn A. Sure, Esq. (Wylie, McBride, Jesinger, Sure & Platten), for the Respondent.
Michael P. Merrill, Esq. (Merrill & Arnone), for the Charging Party.

DECISION

STATEMENT OF THE CASE

JERROLD H. SHAPIRO, Administrative Law Judge. This proceeding, in which a hearing was held on June 4, 1992, is based on an unfair labor practice charge filed on October 9, 1991, by Richard L. Anderson (Anderson), and on a complaint issued on November 23, 1991, on behalf of the General Counsel of the National Labor Relations Board (the Board) by the Board's Regional Director for Region 20, alleging that Sheet Metal Workers International Association Local Union No. 104 (Respondent) has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(1)(A) of the National Labor Relations Act (the Act).

The complaint, in substance, alleges that on or about July 26, 1991, Respondent violated Section 8(b)(1)(A) of the Act by charging Anderson, a member of Respondent, with having violated a rule of Respondent contained in the collective-bargaining agreement between Respondent and Anderson's employer, Brisco Sheet Metal, Inc. (Employer), and by imposing a fine on Anderson for having violated that rule. Respondent filed an answer denying the commission of the alleged unfair labor practices.[1]

On the entire record, and from my observation of the demeanor of the witnesses and having considered the parties' posthearing briefs, I make the following

FINDINGS OF FACT

I. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Evidence*

1. The setting

Respondent represents employees employed by employers in the sheet metal industry who do business in northern California. One of these employers is the Employer, by whom Anderson, the Charging Party in this case, was employed as a journeyman sheet metal worker from April 1980 until May 31, 1991, when he voluntarily terminated his employment. Anderson was a member of the Respondent, during this entire period.

The most recent collective-bargaining agreement between Respondent and the Employer, effective from July 1, 1989, to June 30, 1992, contains in its addendum the following provision relevant to this case:

> ITEM 33. DEFINITION OF EMPLOYEE
>
> . . . .
>
> Section B. All sheet metal work shall be performed by employees employed under terms of this Agreement and applicable addenda. No employee shall become a contractor or sub-contractor for the performance of any work covered by this Agreement while employed or registered for employment in the Hiring Hall Facilities under this Agreement.
>
> Section C. Employee or applicants for employment holding a State Contractor's License of any kind shall inactivate their license in accordance with the Business and Professions Code, being eligible for the use of or continued employment under the Hiring Hall Facilities.
>
> Section D. For the purpose of enforcing the above provisions it shall be the mutual responsibility of Labor and Management contractors license which includes the scope of work covered under this agreement.

The term ''Hiring Hall Facilities'' in the aforesaid contract provision refers to that part of the Employer's collective-bargaining agreement with Respondent, which provides that Respondent shall be the sole and exclusive source of referrals of applicants for employment with the Employer.

It is undisputed that when the Employer hired Anderson in April 1980, the manner in which he was hired complied with the provisions in the then governing collective-bargaining agreement between Respondent and Employer, which re-

[1] In its answer to the complaint Respondent admits it is a labor organization within the meaning of Sec. 2(5) of the Act and in its answer, as amended at the start of the hearing, admits that the Employer meets the Board's applicable discretionary jurisdictional standard and is an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act. I therefore find it will effectuate the polices of the Act for the Board to assert its jurisdiction in this case.

quired the Employer to hire exclusively through the Respondent's hiring hall facility; on being hired by the Employer, Anderson went to Respondent's hiring hall facility where he secured a timely dispatch or referral to his job with the Employer.

Also relevant to this case is section 1(e) of article 17 of the ''Constitution and Ritual'' of Respondent's parent organization, Sheet Metal Workers' International Association, which states, in substance, that a member of Respondent is subject to internal union discipline for ''[v]iolating the established union, collective bargaining agreements and rules and regulations of any local union relating to rates of pay, rules and working conditions.''

During the period encompassed by the Employer's 1989–1992 collective-bargaining agreement with the Respondent, the Respondent's collective-bargaining agreements with other employers in the sheet metal industry contained the above-described provision forbidding unit employees from possessing active contractors' licenses. This provision or a similar one has been included in Respondent's collective-bargaining agreements with employers in the sheet metal industry, including the Respondent's agreements with the Employer, since at least the early 1980s.

Respondent and the employers who have collective-bargaining agreements with it, have historically included this provision in their agreements because of the potential serious conflict of interest between the employers and bargaining unit employees with active contractors' licenses. Respondent and the employers under contract with it have learned from experience that bargaining unit employees with active contractors' licenses not only will compete for business, against their employers, but also will use their positions as unit employees to discover what their employers are bidding for jobs and then use this information to underbid their employers, resulting in a loss of business for the employers and a loss of work for the employers' employees represented by Respondent. In short, Respondent's principal purpose for agreeing to include this provision in its collective-bargaining agreements was to prevent the signatory employers from losing business and the unit employees employed by those employers and represented by Respondent from losing work.

On November 2, 1989, Respondent's business representative Dave Browning, the business representative assigned to police the Employer's contract with the Respondent, filed internal union charges with Respondent against Anderson, containing allegations which are not relevant to this case. On January 9, 1990, Anderson was tried on those charges by Respondent's trial committee. On January 19, 1990, Respondent's president notified Anderson, by letter, that the trial committee had found him guilty as charged and had recommended

> Anderson be fined the sum of $3,000. One Hundred Fifty dollars ($150.00) which is to be paid within ninety (90) days from the date of this notice and $2,850 to be suspended for a probationary period of three years from date of this notice and this fine shall be paid in addition to any future violations and fines during this period.

Respondent's president in this letter also informed Anderson that the trial committee's findings and recommendations had been upheld at a general membership meeting and that Anderson had the right to appeal the trial committee's findings and recommendations.

Anderson exercised his right to appeal to the executive council of the Respondent's parent organization. It denied his appeal. Anderson at this point chose not to press the matter further and apparently paid the $150 fine.

2. Respondent's decision to revoke its suspension of Anderson's fine and the events leading up to that decision

Late in January 1990, Anderson attended contractors' school and enrolled in the course required for a sheet metal contractor's license. Subsequently, he took and passed the test administered by the State of California for a sheet metal contractor's license. On or about August 2, 1990, he received his license from the State of California. Anderson retained this license for the remainder of his employment with the Employer; he did not take the necessary steps to place his license in an inactive status. However, there is no evidence that while employed by the Employer, he ever worked as, or did business as, a sheet metal contractor. Rather, the record reveals Anderson went into business as a sheet metal contractor on or about June 15, 1991, after he terminated his employment with the Employer and resigned from Respondent. Anderson does business as RLA Sheet Metal and does not have a contract with the Respondent.

Anderson testified he did not inform Respondent or its agents that he had enrolled in contractors' school or possessed a contractor's license or intended to go into business as a contractor. Nor does the record contain other evidence that Anderson, during his employment with the Employer, either said or did anything which would warrant the inference that during that period Respondent knew or reasonably should have known he possessed an active contractor's license.

On May 20, 1991, Anderson wrote the Employer stating, in substance, he intended to terminate his employment effective June 1, or earlier. On Friday, May 31, 1991, Anderson terminated his employment with the Employer. On the same day the Employer mailed a notice to the Respondent stating that on May 31, Anderson had terminated his employment. David Browning, the business representative responsible for policing Respondent's contract with the Employer, received this notice on Monday, June 3, 1991.

On May 31, 1991, Anderson tendered to Respondent his resignation from membership. He did this by letter mailed to Respondent's headquarters located in San Francisco, California. Anderson's letter of resignation was received by Respondent's San Francisco office on Monday, June 3, and forwarded to Browning's office in Petaluma, California. Browning did not receive Anderson's letter of resignation until June 4 or 5.

During the last 2 weeks of May 1991, more than a week prior to his receipt of the Employer's notice of Anderson's termination, Browning was informed by three of Respondent's members, who were employed by the Employer, that they had heard Anderson was going into business as a nonunion sheet metal contractor. On receipt of this information, Browning immediately commenced to investigate. He visited the Employer's jobsites, where he observed Anderson at work for the Employer. He also spoke to several of the Em-

ployer's employees, who confirmed that Anderson was still employed by the Employer. He also drove by Anderson's home to look for evidence which indicated Anderson was in business for himself, and found none. This ended Browning's investigation. He concluded that the members who had heard Anderson was going into business for himself as a nonunion sheet metal contractor were mistaken.

Subsequently, on June 3, as described supra, Browning received the Employer's notice that Anderson had terminated his employment as of Friday, May 31, 1991. The receipt of this information did not prompt Browning to resume his investigation of Anderson's status as a sheet metal contractor. But, when, on either June 4 or 5, he received Anderson's letter of resignation, Browning decided to resume his investigation into Anderson's status as a contractor. Browning, among other things, checked with the several municipalities in the area to determine if Anderson was licensed to do business and checked with the California State Contractors' License Board to determine whether Anderson possessed a sheet metal contractor's license. His investigation failed to uncover evidence that Anderson, while employed by the Employer, had engaged in business as a sheet metal contractor. It did reveal, however, that Anderson since about August 2, 1990, had possessed an active sheet metal contractor's license.

On July 26, 1991, Browning, acting in his capacity as Respondent's business representative, wrote William James Hill, Respondent's financial secretary treasurer, the following letter:

> Please be advised that investigation has revealed that Richard L. Anderson . . . was in possession of an active California State Contractors License (. . . C–20 classification) prior to his resignation from the Sheet Metal Workers International Association of May 31, 1991.
>
> This information constitutes violation of contract language, and therefore also of the following provision of the Constitution and Ritual of the Sheet Metal Workers' International Association:
>
> Article Seventeen (17) 1(e)
>
> Therefore, the portion of the fine imposed and suspended by order of the Trial Committee of January 9, 1990 is due and payable.

On August 6, 1991, Hill, on Respondent's behalf, wrote Anderson a letter, in which he enclosed a copy of Browning's July 26 letter. Hill's August 6 letter to Anderson reads:

> Re: Violation of Probationary Period
>
> Dear Sir:
>
> Please find enclosed a copy of a letter from Local No. 104 Business Representative, Dave Browning, in which it is alleged that you are violating the provisions of the Local No. 104 Trial Committee's Findings and Recommendation. (See attached.)
>
> Prior to initiating litigation to collect the amount of fine suspended, Two Thousand Eight Hundred and Fifty Dollars ($2,850) plus all collection costs, you are advised of the opportunity to refute the allegation of violation by requesting a hearing on the matter before the Local No. 104 Trial Committee.
>
> Please contact this office, and the undersigned, within ten (10) days from the mailing date of this letter if you require a hearing to be scheduled or not. Lack of response from you within the ten (10) days will cause this office to initiate appropriate collection proceedings.

Anderson did not, as instructed, contact Respondent to request an opportunity to be heard by Respondent's trial committee.

On August 20, 1991, by letter, Respondent's attorneys notified Anderson that Respondent was demanding immediate payment of his $2850 fine and that Respondent's lawyers were authorized to collect that fine and would also seek attorneys' fees and costs incurred in addition to the total amount of the award.

Browning testified his only reason for seeking to have Respondent reimpose Anderson's $2850 suspended fine was because Anderson, prior to his May 31, 1991 resignation from Respondent, by working for the Employer while possessing an active contractor's license, had violated Respondent's collective-bargaining agreement and constitution. Browning was then asked, by counsel for the Charging Party, if he would still have asked Respondent to reimpse Anderson's suspended fine, if, after resigning from Respondent and terminating his employment with the Employer, Anderson had opened a ''Union Shop''? Anderson answered, ''I don't know. That never happened. It's hypothetical.'' However, when counsel pressed him for an answer to that question, Browning testified that if, after resigning from Respondent and terminating his employment with the Employer, Anderson had opened a union shop and signed a contract with the Respondent, Browning would ''possibly not'' have sought the reimposition of Anderson's suspended fine because, as Browning testified, ''[Anderson] would not be damaging the Union at that point. He'd be a Union contractor. He'd be in compliance as far as I was concerned. I could waive that.'' Later, during his further questioning of Browning, counsel for the Charging Party reminded Browning that he had previously testified that if, after resigning from Respondent, Anderson had opened a union shop, Browning might have waived and not pursued Anderson's prior conduct of working for the Employer with an active contractor's license. Browning answered, as he had done initially, that that testimony was unreliable due to the hypothetical nature of the question: specifically, Anderson testified, ''there are too many circumstances to really responsibly answer that. [Anderson] may not have resigned from the Union to open a Union shop. He may have remained a member of the Union to open a Union shop.[2] There are a lot of things there that did not happen I can't tell you about. Speculation.''

As described above, Respondent's collective-bargaining agreements have historically contained a provision which requires the employees represented by Respondent to deactivate their state contractors' licenses while employed by an employer under contract with Respondent. There is no evidence that if an employee-member with an active state contractor's license does not use it to do business while em-

[2] Although it is a violation of Respondent's constitution for an owner-member to operate a nonunion business, it is not considered improper for an owner-member (as distinct from an employee-member) to operate his or her business under contract with the Respondent.

ployed as an employee, that Respondent does not discipline him or her for possessing an active contractor's license while employed by an employer under contract with the Respondent. On the other hand, Respondent introduced no evidence that in the past that Respondent had disciplined employee-members for engaging in this kind of conduct.[3] However, during the cross-examination of Respondent's witness Hill, counsel for the General Counsel, established that during the time material internal union charges were filed against employee-members Valladao and Barry for merely possessing (not using) active state contractor's licenses while employed by employers under contract with Respondent.

On May 28, 1991, employee-member Valladao was charged and subsequently the Respondent's trial committee fined him $5436 for possessing an active contractor's license while employed by his employer.

On August 19, 1991, employee-member Barry was charged and subsequently Respondent's trial committee fined him $9500 for possessing an active contractor's license while employed by his employer. In Barry's case, the trial committee imposed such a large fine because in deciding *on the amount of fine*, it took into account the fact that Barry had activated his inactive contractor's license after having been expressly warned by one of the Respondent's business representatives that he should not work for the Employer, if he possessed an active contractor's license. In this last regard, the record establishes that Barry, who had an active contractor's license, was not employed by an employer under contact with the Respondent, but wanted to go back to work for an employer that was under contract with the Respondent and when the Respondent's business representative was informed of this, he instructed Barry to deactivate his contractor's license before going to work for a signatory employer. Barry followed this instruction and deactivated his contractor's license and was then dispatched by the Respondent's hiring hall facility to a signatory employer, but during the time he was employed by that employer he reactivated his contractor's license and when Respondent discovered this, it filed charges against him which resulted in his being disciplined. In view of these undisputed facts, counsel for the General Counsel's assertion, in her posthearing brief that ''[Barry] was allowed to deactivate [his] license without penalty,'' is not accurate insofar as it suggests that Respondent initially did not charge and discipline him for working for a signatory employer while he possessed an active contractor's license.

B. *Discussion and Conclusions*

The essential facts, which have been set forth in detail supra, may be briefly summarized, as follows. Historically, Respondent's collective-bargaining agreements with employers, including the Employer, doing business as sheet metal contractors, have included a provision which, in substance, prohibits bargaining unit employees from possessing an active state contractor's license. It is also a violation of the Respondent's ''Constitution and Ritual'' for an employee-member to violate the aforesaid contractual provision. Anderson, an employee-member of Respondent, during his last 10 months of employment with the Employer, possessed an active state contractor's license, in violation of the aforesaid contractual and constitutional provisions. Anderson terminated his employment with the Employer on May 31, 1991, and at the same time tendered his resignation to the Respondent, which was received on June 3, 1991. Subsequently, Respondent charged Anderson with violating Respondent's constitution and ritual by working for the Employer while possessing an active state contractor's license, in violation of the governing collective-bargaining agreement, and fined him $2850 for engaging in that conduct.

The ultimate question presented is whether by charging and fining Anderson because he violated the governing collective-bargaining agreement and therefore the Respondent's constitution and ritual, by working for the Employer while possessing an active state contractor's license, Respondent violated Section 8(b)(1)(A) of the Act. In her posthearing brief, counsel for the General Counsel advances the following alternate theories in support of the alleged violation: (1) Respondent's rule, which requires that its employee-members ''inactivate'' their state contractors' licenses while employed by employers under contract with the Respondent, was not reasonably enforced against Anderson; (2) Anderson was charged and fined because he resigned from Respondent; or (3) Anderson was charged and fined in retaliation for his postresignation conduct of operating a nonunion business. For the reasons below, these contentions lack merit, and I shall recommend that the complaint be dismissed in its entirety.

II.

Under Section 7 of the Act, employees are guaranteed the ''right to self-organization, to form, join, or assist labor organizations . . . and to engage in other mutual aid or protection, and shall also have the right to refrain from any or all such activities . . . .'' Section 8(b)(1)(A) of the Act makes it an unfair labor practice for a union to ''restrain or coerce'' employees in the exercise of the rights guaranteed them by Section 7. A proviso to Section 8(b)(1)(A) preserves the right of a union ''to prescribe its own rules with respect to the acquisition or retention of membership therein.''

The Supreme Court in *Scofield v. NLRB*, 394 U.S. 423, 430 (1969), interpreted the proviso to Section 8(b)(1)(A) and in doing so laid down the following principle, which the General Counsel contends applies to this case: ''Sec. 8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is *reasonably enforced against union members* who are free to leave the union and escape the rule. [Emphasis added.]''

Counsel for the General Counsel argues that the record establishes that the reasonable enforcement requirement of the *Scofield* test was not complied with by the Respondent because of the following factors: prior to disciplining Anderson for merely possessing an active contractor's license (as distinct from possessing and using the license to do business as a contractor), Respondent had not disciplined its employee-members for that this type of conduct; in the one case where

[3] R. Exhs. 6 and 7 were introduced into evidence by Respondent for the sole purpose of establishing that Respondent's employee-members, including Anderson, had noticed that Respondent disciplined employee-members who worked as employees while possessing active contractors' licenses. I admitted these exhibits into evidence, over the objection of the Charging Party, only for this limited purpose.

Respondent instructed an employee-member (Barry) to deactivate his state contractor's license, the member was allowed to deactivate his contractor's license, without being disciplined by Respondent; and, there is a lack of evidence Respondent informed its employee-members, including Anderson, that they would be subject to internal union discipline for merely possessing active contractors' licenses while working for an employer under contract with the Respondent. These contentions are either factually without support or, even if true, do not as a matter of law warrant the conclusion that Respondent's discipline of Anderson violated Section 8(b)(1)(A) of the Act.

Contrary to the General Counsel's assertion, as I have found supra, there is no evidence of disparate treatment. More specifically, there is no evidence that Respondent treated Anderson differently than other employee-members, similarly situated, when it disciplined him for possessing an active state contractor's license while employed by the Employer, even though it had no evidence Anderson did business as a contractor during that time period. Quite the opposite, as I have found supra, in at least two instances, Respondent disciplined employee-members, who, like Anderson, merely possessed active state contractors' licenses while employed by employers under contract with Respondent.

It is unnecessary to decide whether Respondent gave Anderson notice that as an employee-member he was obligated by the governing collective-bargaining agreement and Respondent's constitution and ritual to deactivate his contractor's license while employed by the Employer, or face internal union discipline. I have not decided whether Anderson received adequate notice of this obligation because, as described in detail supra, it is undisputed that Respondent's discipline of Anderson did not affect his employment or employment opportunities. Thus, Respondent's discipline of Anderson for violating Respondent's rule here would not violate Section 8(b)(1)(A) of the Act, even if Respondent had not made Anderson aware of his obligation as an employee-member to deactivate his state contractor's license while employed by the Employer. See *Carpenters Local 720 v. NLRB*, 798 F.2d 781 (5th Cir. 1986).

I considered that the court in *Carpenters Local 720* refused to enforce the Board's decision, and as an administrative law judge of the Board, I am obliged to follow the decision of the Board rather than the court's. However, the facts in *Carpenters Local 720* differ significantly from those in the instant case. There, the Board found the union violated Section 8(b)(1)(A) by imposing discipline on an employee-member for refusing to obey a change made by the union in its hiring hall policy, even though the union's membership had not received advance notice of the policy change. *Carpenters Local 720 (UMC of Louisiana)*, 276 NLRB 59 (1985). Here, there was no change in union policy. To the contrary, as I have found supra, historically the employee-members of the Respondent were obligated by Respondent's constitution and ritual and by the governing collective-bargaining agreements with the employers in the sheet metal industry to deactivate their state contractors' licenses or face internal union discipline. Indeed, it is undisputed that when Anderson received his state contractor's license he possessed a copy of the Respondent's constitution and ritual and a copy of the Respondent's 1986–1989 contract with the Employer, which contained the provisions obligating the employee-members of Respondent to deactivate their state contractors' licenses.

There is no evidence, or even a contention, that Respondent's rule requiring employee-members to deactivate their state contractors' licenses, as it was applied to Anderson, invaded or frustrated any policy Congress has imbedded in the labor laws. I therefore find that the rule, as it was applied by Respondent to Anderson, did not invade or frustrate any policy Congress has imbedded in the labor laws.

Counsel for the General Counsel in her posthearing brief does not contend that Respondent's rule here, as enforced against Anderson, did not reflect a legitimate union interest as contemplated by *Scofield*. However, as set forth in detail infra, the complaint alleges that Respondent's discipline of Anderson violated the Act because Respondent's enforcement of its rule against Anderson was not ''reasonably related to a legitimate goal and function of Respondent.'' I disagree because the record establishes Respondent had a legitimate interest in requiring that Anderson deactivate his state contractor's license while employed by the Employer, even though Respondent had no evidence that he used his license to do business as a contractor while employed by the Employer. For, as I have found supra, Respondent has learned from past experience that unit employees, who, like Anderson, possess active state contractors' licenses, in fact compete for business with their employers, and in doing so use their positions as unit employees to discover their employers' bids and then use this information to submit lower bids, resulting in a loss of work for the unit employees represented by the Respondent. In view of this, when Respondent learned Anderson had possessed an active state contractor's license while employed by the Employer, Respondent was not required to wait before disciplining him until it had evidence he had actually used his license while employed by the Employer. Rather, Respondent had a legitimate interest in enforcing against Anderson the contractual and constitutional provisions which forbade employee-members of Respondent from working for employers while possessing active state contractors' licenses.

It is for the foregoing reasons that I reject General Counsel's contention that Respondent's rule here, as it was enforced against Anderson, did not comply with the reasonable enforcement requirement of the *Scofield* test. Alternatively, I find that even assuming the rule, as applied to Anderson, was not reasonably enforced and/or did not reflect a legitimate union interest, its enforcement against Anderson still did not violate Section 8(b)(1)(A) of the Act, because the enforcement of the rule against Anderson did not affect Anderson's employment or employment opportunities nor did it contravene any Federal policy.

III.

The previous discussion of the legality of Respondent's enforcement against Anderson of its rule forbidding employee-members with active state contractors' licenses from working for employers under contract with Respondent was based on the assumption that Respondent enforced the rule against Anderson because, while employed by the Employer, he possessed an active state contractor's license. Counsels for the General Counsel and the Charging Party take the position, however, that Respondent used its knowledge of Anderson's possession of an active state contractor's license while

employed by the Employer, as an excuse to discipline him for having resigned from Respondent. If they are correct and the real reason for Respondent's discipline of Anderson was to punish him for resigning from Respondent, then Respondent's discipline of Anderson violated Section 8(b)(1)(A) of the Act, because the law is settled that an employee-member's right to resign from a labor organization is protected under Section 7 of the Act. *Pattern Makers League v. NLRB*, 473 U.S. 95 (1985); *Machinists Local 1414 (Neufield Porsche-Audi)*, 270 NLRB 1330, 1331 (1984).

In order for the Respondent's discipline of Anderson to come within the proscription of Section 8(b)(1)(A) of the Act, under the aforesaid theory, it must be shown that a motivating factor in Respondent's discipline of Anderson was to retaliate against him for engaging in conduct protected by the Act, in this case his resignation from Respondent. See *Toledo World Terminals*, 289 NLRB 670, 673–674 (1988); *Oil Workers Local 4–23 (Gulf Oil)*, 274 NLRB 475, 477 (1985). Where, as here, it is asserted that there was a legitimate basis for union discipline, the Board has concluded that a *Wright Line* analysis is appropriate.[4] See *Auto Workers Local 2017 (Federal Mogul)*, 283 NLRB 799, 799 fn. 1 (1987); *Toledo World Terminals*, 289 NLRB 670, 673–674 (1988); *Teamsters Local 287 (Consolidated Freightways)*, 300 NLRB 539 (1990), and cases cited there. Thus, once General Counsel establishes the employee-member's protected activity was ''a motivating factor'' in the union's decision to discipline, the discipline is unlawful unless the record as a whole establishes that the disciplinary action would have been taken even in the absence of the protected activity.

For the reason below, I am of the opinion that the record as a whole[5] fails to establish that a motivating factor in the Respondent's decision to discipline Anderson was his resignation from Respondent.

Initially, as I have found supra, I note there is no evidence of disparate treatment. More specifically, there is no evidence that Respondent treated Anderson differently than other employee-members, similarly situated, when it disciplined him for possessing an active state contractor's license while employed by the Employer, even though Respondent had no evidence that Anderson did business as a contractor during that time period. It is not surprising Respondent disciplined him without such evidence, because the rule which Anderson violated makes no distinction between employee-members who only possess and employee-members who possess and use their contractors' licenses. The rule, as set forth in the governing collective-bargaining agreement, states, in pertinent part, that ''[n]o employee shall become a contractor . . . for the performance of any work covered by this Agreement while employed . . . under this Agreement'' and that ''[e]mployees . . . holding a State Contractors' License of any kind shall inactivate their license . . . before being eligible for . . . continued employment under the Hiring Hall Facilities.'' Moreover, as I have found supra, in at least two instances, Respondent disciplined employee-members, who, like Anderson, merely possessed active state contractors' licenses while employed by employers under contract with the Respondent. All these circumstances militate against a finding of unlawful motivation.

The timing of the commencement of Respondent's investigation which lead to Respondent's discovery that Anderson had possessed an active state contractor's license while employed by the Employer, and the timing of Anderson's discipline by Respondent, coming immediately after Anderson's resignation from Respondent, is the only record evidence which suggests that Anderson's resignation was a motivating factor in Respondent's decision to discipline him for possessing an active state contractor's license while employed by the Employer. However, when all the record evidence which is pertinent to the timing of Respondent's decision to investigate and discipline Anderson is evaluated in its entirety, it warrants the conclusion that the timing of Respondent's conduct here is insufficient to establish that Anderson's resignation was a motivating factor in Respondent's decision to discipline him.

Although Respondent failed to discipline Anderson for possessing an active state contractor's license during the 10 months he possessed such a license while employed by the Employer, there is no evidence whatsoever that during that time period Respondent knew about Anderson's license or reasonably should have known about it. Anderson's possession of a state contractor's license is not the type of conduct which, by its nature, was likely to come to Respondent's attention. Also, Anderson testified he did not inform Respondent that he had enrolled in contractors' school or possessed a state contractor's license or intended to go into business as a contractor. Nor does the record contain evidence that Anderson, during his employment with the Employer, either said or did anything which would warrant the inference that Respondent knew or reasonably should have known he possessed an active state contractor's license. Moreover, during its case-in-chief, Respondent presented evidence, not disputed by the General Counsel or the Charging Party, which establishes Respondent did not learn of Anderson's state contractor's license until after his resignation from Respondent. In view of these circumstances, I find that the timing of Anderson's discipline does not warrant the inference that Anderson's resignation was a motivating factor in Respondent's decision to discipline him.

Although it was immediately after learning Anderson had tendered his resignation to Respondent, that Respondent's business representative, Browning, commenced to investigate whether Anderson had possessed an active state contractor's license while employed by the Employer, the record as a whole reveals Browning did not have an improper motive for commencing the investigation, but was motivated by a legitimate reason.

Browning, whose testimonial demeanor was good, testified that when, on June 4 or 5, 1991, he received Anderson's letter of resignation, he commenced to investigate whether Anderson possessed a state contractor's license while employed by the Employer, because he thought it was possible that Anderson's reason for resigning from Respondent was to insulate himself from being disciplined by Respondent for having possessed an active contractor's license while employed by the Employer. Browning further testified he knew Anderson earned his living employed as a sheet metal worker; there-

[4] *Wright Line*, 251 NLRB 1083 (1983). The Board's use of the *Wright Line* analysis with respect to alleged violations of Sec. 8(a)(3) of the Act was endorsed by the Supreme Court in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983).

[5] I have examined the entire record to determine if a prima facie case of improper motivation has been shown. See generally *Greco & Haines, Inc*., 306 NLRB 634 (1992).

fore, his resignation from Respondent coupled with his having terminated his employment with the Employer on May 31, 1991, indicated to Browning that perhaps there was truth to the rumor, which several employee-members of Respondent had previously communicated to Browning, about Anderson starting a nonunion sheet metal contracting business. Considering these circumstances, Browning, on receipt of Anderson's letter of resignation, was not unreasonable in thinking that perhaps Anderson had resigned to insulate himself from being disciplined for having been employed by the Employer while possessing an active state contractor's license. In other words, I credit Browning's testimony that his decision to investigate was not motivated by a desire to retaliate against Anderson for having resigned from Respondent, but was based on a good-faith belief that Anderson possessed an active state contractor's license and that prior to his resignation from Respondent had possessed this license while employed by the Employer, and that his resignation from Respondent was an attempt to insulate himself from being disciplined for having violated Respondent's rule prohibiting employee-members from engaging in that type of conduct.

I considered Browning's testimony that if, after resigning from Respondent and terminating his employment with the Employer, Anderson had gone into business as a union contractor and signed a contract with the Respondent, that Browning ''*possibly*'' might not have sought to have Anderson disciplined for having worked for the Employer while possessing an active state contractor's license. However, when Browning's testimony in this regard is viewed in its entirety, as previously set forth in detail supra, it is clear that it does not raise to the level of an admission against interest, but is no more than sheer speculation and, as such, is without evidentiary value in evaluating the General Counsel's prima facia case, and because of this fails to establish that a motivating factor in Respondent's decision to discipline Anderson was to retaliate against him for going into business as a nonunion employer. In any event, because doing business as a nonunion *employer* is not the type of conduct encompassed by Section 7 of the Act, even if Respondent's discipline of Anderson was motivated by this conduct, it would not constitute a violation of Section 8(b)(1)(A) of the Act.

I have also considered the General Counsel's contention that Respondent's unlawful motivation for disciplining Anderson may be inferred by the unreasonableness of Respondent's conduct in enforcing its rule against Anderson, when its enforcement against Anderson is considered in the context of the rule's purpose. I disagree. Rather, for the reasons previously set forth supra, I find that Respondent has enforced the rule against other employee-members, in circumstances similar to Anderson's, and that the enforcement of the rule against Anderson was reasonably related to the rule's main purpose, which, as I have found supra, is to avoid the loss of bargaining unit work by employees represented by the Respondent. The General Counsel's contention that Respondent's illegal motive may be inferred from the fact that it disciplined Anderson even though it had no evidence that he did business as a contractor while employed by the Employer, is undermined by the manner in which Respondent has previously enforced the rule, by the plain language of the rule, and by common sense which dictates that Respondent not wait until violators of the rule's plain language actually use their contractors' licenses to do business as contractors before disciplining them.

In summation, the following factors, when viewed together, have persuaded me that the record as a whole fails to establish that Anderson's resignation from the Respondent was a motivating factor in Respondent's decision to discipline him: the misconduct for which he was disciplined was encompassed by the plain language of the rule which Respondent applied to Anderson's misconduct; the lack of evidence that in applying the rule in Anderson's case, Respondent treated him differently than other employee-members; the evidence that other employee-members have been found guilty by Respondent of violating the rule by engaging in conduct identical to Anderson's; it was only after Anderson had resigned from the Respondent that the Respondent learned he had engaged in conduct, while a member of Respondent, which violated the rule; and, Respondent had a proper motive for instituting the investigation which uncovered the evidence of Anderson's violation of the rule.

IV.

In its posthearing brief the Charging Party argues that Respondent's rule involved in this case is unlawful on its face. The Charging Party acknowledges the General Counsel ''has elected not to prosecute this case under the theory of the invalidity of the [rule].'' In fact, counsel for the General Counsel in her posthearing brief expressly concedes that the rule ''is valid on its face.'' (Br. 15.) However, the Charging Party contends that the complaint specifically alleges that the rule here is illegal on its face and, in any event, contends that the issue was fully litigated without objection, thus the Board for this additional reason is obligated to decide whether the rule is unlawful per se. I disagree and, for the reasons below, have not considered whether the Respondent's rule involved in this case is unlawful on its face.

Paragraph 6 of the complaint consists of subparagraphs (a) through (e), as follows: 6(a) alleges that at all times Respondent maintained a rule making it an offense for its members to violate ''the established union collective bargaining agreement and rules and regulations relating to rates of pay, rules and working conditions''; 6(b) alleges that at all times Respondent and the Employer had a collective-bargaining agreement (referring to the parties' 1989–1992 agreement) containing the following provision:

> All sheet metal work shall be performed by employees employed under terms of this Agreement and applicable Addenda. No employee shall become a contractor or sub-contractor for the performance of any work covered by this Agreement while employed or registered for employment in the Hiring Hall Facilities under this Agreement. *Owner/Member who abandon such status and who register for referral must suspend any license held as an Owner-Member employee during any period such owner is registered for referral or has been dispatched pursuant to the hiring and referral procedures contained herein* [emphasis added].[6]

[6] The italicized portion of the alleged contractual provision, dealing with the obligation of ''owner/members,'' is not contained in the collective-bargaining agreement between Respondent and the Employer. The relevant contractual language is contained in secs. B,C,

Subparagraph 6(c) alleges, in substance, that Respondent charged Anderson with violating the contract provision set forth in subparagraph 6(b), even though at the time of the alleged infraction Anderson was not registered for employment nor in several years been dispatched from Respondent's hiring hall; 6(d) alleges Respondent failed to notify Anderson that the rule and contract provision described in subparagraphs 6(a) and 6(b) would be applicable to him; and 6(e) alleges that ''[t]he contract provision described above in subparagraph 6(b) as applied to Anderson, without prior notice by Respondent, is unlawful and not reasonably related to a legitimate goal and function of Respondent.''

Paragraph 7 of the complaint alleges that Respondent fined Anderson for violating the contractual provision set forth in subparagraph 6(b) ''and/or for conduct he engaged in after he had previously tendered to Respondent a valid membership resignation and was not a member of Respondent.''

Paragraph 8 of the complaint alleges Respondent violated Section 8(b)(1)(A) of the Act ''[b]y the conduct described above in paragraphs 6 and 7.''

The week before the June 4, 1992 hearing in this case, I held a telephone conference with the parties to, among other things, clarify the issues involved. During the conference counsel for the General Counsel, in response to my inquiry, indicated that the theory of the complaint was *not* that the contractual provision alleged in the complaint was unlawful on its face, but that it was the unreasonable and improperly motivated way in which the provision was applied by Respondent, in Anderson's case, that was unlawful. I remarked that I felt that on its face the complaint could be construed to allege that the maintenance of the provision, by itself, was unlawful and suggested to counsel for the General Counsel that she consult with her superiors about the matter and at the start of the hearing set forth the General Counsel's theory of the case, because, as I explained, it was extremely important that Respondent know whether it was just defending against an alleged unlawful application of the contract provision or whether it was defending against an allegation that placed in question the legality of the provision by itself, which was a provision contained in apparently all the collective-bargaining agreements between Respondent and employers in the sheet metal industry in northern California.

On June 4, 1992, when the hearing opened, but before the introduction of evidence, a discussion took place about the scope of the complaint. I again indicated that I thought the unfair labor practice allegations of the complaint were broad enough to encompass the issue of whether Respondent's rule involved in the case was illegal per se. Counsel for the Charging Party stated it was the Charging Party's position that the rule was unlawful on its face. Counsel for the General Counsel stated it was the position of the General Counsel that the rule was not unlawful on its face, that it was only the manner in which the rule was applied to Anderson which was being alleged as a violation of the Act, and further explained that the rule was a legitimate rule, but Respondent had applied it in Anderson's case unreasonably and with an improper motive. I remarked that in view of the General Counsel's position as to the scope of the complaint, I had serious doubts whether the Charging Party could litigate the legality of the Respondent's rule, but stated I would deal with that issue when and if the other parties objected to the Charging Party's effort to litigate the issue. The matter was not raised again during the presentation of evidence, because the Charging Party made no effort as part of its case to introduce evidence in support of its contention that Respondent's rule here was unlawful on its face.

A more careful reading of the complaint, then my initial reading, now leads me to conclude that although the complaint is not a model of clarity, it does not allege that Respondent's rule here is unlawful on its face. Rather, it alleges, in substance, that the rule violated the Act because of the way in which it was applied by Respondent to discipline employee-member Anderson. I have considered that due to the way in which the complaint is worded, an argument can be made that, in this respect, the complaint is ambiguous. But, assuming this is true, none of the parties to this case could have been misled by this ambiguity because, at the outset of the hearing, before any evidence was introduced, counsel for the General Counsel unequivocally asserted that the complaint's unfair labor practice allegations did not question the legality of the Respondent's rule, per se, but only the legality of the rule as it was applied by Respondent in disciplining Anderson. Subsequently, in her posthearing brief counsel for the General Counsel, in effect, reiterated that statement of position. Under these circumstances, and because ''[i]t is settled that a Charging Party cannot enlarge upon or change the General Counsel's theory,'' I am without authority to expand the scope of the complaint over the objection of the General Counsel. *Kimtruss Corp.*, 305 NLRB 710 (1991); *Harowe Servo Controls*, 250 NLRB 958, 963 (1980).

In any event, even if the complaint can be interpreted to allege that the Respondent's rule here is illegal on its face, it would still be impermissible for me to consider that issue because the General Counsel effectively withdrew that portion of the complaint in a timely manner. Thus, as I have found supra, the General Counsel at the start of the hearing, before the introduction of any evidence, disputed the Charging Party's contention that the scope of the complaint was broad enough to encompass the Charging Party's theory that Respondent's rule alleged in the complaint was illegal on its face. The General Counsel at that time made it clear that the complaint did not challenge the legality of the Respondent's rule, but only challenged Respondent's motivation and manner in applying it to employee-member Anderson. Under the circumstances, assuming that the complaint may be interpreted as alleging that Respondent's rule is illegal on its face, the General Counsel *in affect* timely withdrew that portion of the complaint. Cf. *Sheet Metal Workers Local 28 (American Elegen)*, 306 NLRB 981 (1992).

Frito Co. v. NLRB, 330 F.2d 458 (9th Cir. 1964), on which the Charging Party relies, is inapposite. In *Frito*, evi-

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and D of item 33 contained in the addendum to the parties' 1989–1992 agreement. It has been previously set forth in haec verba and, instead of the underlined language above, states in pertinent part, ''[e]mployees or applicants for employment holding a State Contractors' License of any kind shall inactivate their license . . . before being eligible for the use or continued employment under the Hiring Hall Facilities.'' Despite this variance between the pleadings and the proof, Respondent has not been prejudiced because it is clear that once the hearing commenced the Respondent was placed on notice that it was the application of this contractual provision to Anderson, and not the application of the one alleged in the complaint, which was the basis of the General Counsel's complaint.

dence concerning unfair labor practices not alleged in the complaint was admitted into the record without objection. The court held that in such a situation the Board has the power to consider the evidence because the General Counsel, by not objecting to the evidence,

> thereby consented to the introduction of the issue to which the evidence was addressed. The Trial Examiner and the Board were then free to consider the evidence and to exercise judicial discretion as to whether to permit amendment to conform to proof. [330 F.2d at 465.]

The court, however, emphasized that as a general rule,

> [I]t is well established that the Board is not empowered to allow amendments to the complaint which the General Counsel has rejected. These are amendments proposed by other parties than the General Counsel and were it possible for them to impose amendments to the complaint, the final authority of the General Counsel to the issue complaints would be the circumvented. *The authority to issue complaints is authority to determine what they shall contain*. [Emphasis added, 330 F.2d at 464.]

Unlike *Frito*, here there is no evidence that the General Counsel consented to litigate the legality of the contractual provision requiring employee-members of Respondent to deactivate their state contractors' licenses, as opposed to its legality under the circumstances in which it was applied by Respondent to discipline Anderson. I considered that, without objection, Respondent introduced evidence to explain the reason for the inclusion of this provision in Respondent's collective-bargaining agreements with the Employer and the other employers in the sheet metal industry in northern California. However, the conduct of the Respondent and the General Counsel with respect to the introduction of this evidence cannot be construed as a consent to expand of the scope of the complaint, where, as here, the complaint specifically alleged that Respondent's discipline of Anderson was unlawful because the contractual provision here, ''as applied to Anderson . . . is . . . not reasonably related to a legitimate goal and function of Respondent.'' Clearly, in not objecting to Respondent's introduction of evidence about the purpose of the contractual provision involved in this case, counsel for the General Counsel realized it was being introduced and admitted solely in connection with this allegation of the complaint. Thus, the General Counsel cannot be said to have consented to expand the scope of the complaint by not objecting to the introduction of this evidence. Under the circumstances, and because of the General Counsel's unequivocal statement at the outset of the hearing that the entire case was being tried on the premise that the contractual provision which Anderson had been disciplined for violating was *not* unlawful on its face, the court's decision in *Frito* is inappropriate.

V.

It is for the reasons set forth above that I conclude that the record as a whole does not establish, as alleged in the complaint, that Respondent violated Section 8(b)(1)(A) of the Act by charging Anderson with having violated a rule of Respondent and by fining him for having violated that rule. I therefore shall recommend that the complaint be dismissed in its entirety.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The complaint is dismissed in its entirety.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.